FILED
FEB 2 1 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-915

In the Supreme Court of the United States

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

ROSEMARY MILLER
GENERAL COUNSEL
JEFFERSON COUNTY BOARD OF EDUCATION
3332 NEWBURG ROAD
LOUISVILLE, KY 40218
(502) 485-3154

FRANCIS J. MELLEN, JR.
Counsel of Record
BYRON E. LEET
WYATT, TARRANT & COMBS, LLP
PNC PLAZA, 500 W. JEFFERSON ST.
LOUISVILLE, KY 40202
(502) 589-5235

Attorneys for Respondents

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed, *per curiam*, a thorough and well-reasoned District Court opinion which held that the student assignment plan of the Jefferson County, Kentucky public schools -- which provides that the schools shall be racially integrated -- complies with the Equal Protection Clause of the Fourteenth Amendment as construed by this Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

I. Procedural History 1

II. The Challenged Student Assignment Plan 3

ARGUMENT 8

I. The Sixth Circuit's Decision Does Not Conflict With Any Decision Of This Court Or Any Court Of Appeals 8

II. The Student Assignment Plan Complies With The Equal Protection Clause As Construed By This Court In *Grutter* And *Gratz* 11

A. The Board Has A Compelling Governmental Interest In Maintaining Racially Integrated Schools 11

B. The Student Assignment Plan Is Narrowly Tailored To Accomplish Its Purpose 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 14, 17, 18

Brewer v. West Irondequoit Central School District,
212 F. 3d 738 (2d Cir. 2000) 8, 11

Brown v. Board of Education,
347 U.S. 483 (1954) 11

Cavalier v. Caddo Parish School Board,
403 F. 3d 246 (5th Cir. 2005) 9

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 13

Comfort v. Lynn School Committee,
418 F. 3d 1 (1st Cir. 2005), *cert. denied*,
126 S. Ct. 798 (Dec. 5, 2005) (No. 05-348) . . 8, 9, 10

Doe v. Kamehameha Schools,
416 F. 3d 1025 (9th Cir. 2005) 10

Eisenberg v. Montgomery County Public Schools,
197 F 3d 123 (4th Cir. 1999), *cert. denied*,
529 U.S. 1019 (2000) 9

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 11

Gratz v. Bollinger, 539 U.S. 244 (2003) . . . . . *passim*

Grutter v. Bollinger, 539 U.S. 306 (2003) . . . . . *passim*

Hampton v. Jefferson County Board of Education,
72 F. Supp. 2d 753 (W.D. Ky. 1999) 2, 14

Hampton v. Jefferson County Board of Education,
102 F. Supp. 2d 358 (W.D. Ky. 2000) 2, 14

Newburg Area Council, Inc. v. Board of Education of Jefferson County,
489 F. 2d 925 (6th Cir. 1973),
vacated and remanded, 418 U.S. 918 (1974),
reinstated, 510 F. 2d 1358 (6th Cir. 1974),
cert. denied, 421 U.S. 931 (1975) 1

Parents Involved in Community Schools v. Seattle District No. 1,
426 F. 3d 1162 (9th Cir. 2005),
pet. for cert. filed, No. 05-908
(Jan. 18, 2005) 8, 9, 10

Regents of University of California v. Bakke,
438 U.S. 265 (1978) 11, 16, 18

Smith v. University of Washington,
392 F. 3d 367 (9th Cir. 2005), *cert. denied*,
126 S. Ct. 334 (Oct. 3, 2005) (No. 04-1408) . . . 9, 10

Tuttle v. Arlington County School Board,
195 F. 3d 698 (4th Cir. 1999), *cert. dismissed*,
529 U.S. 1050 (2000) 9

Wessman v. Gittens,
160 F. 3d 790 (1st Cir. 1989) 9, 18

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 17, 18

STATUTES

42 U.S.C. § 1981 10

STATEMENT OF THE CASE[1]

I. Procedural History

The Jefferson County, Kentucky public school district (the "School District") encompasses the state's largest city, Louisville. Trial transcript ("Tr.") 2-72. Respondent Jefferson County Board of Education (the "Board") operates preschool programs, 87 elementary schools, 23 middle schools, 20 high schools, and alternative and special schools in the School District. About 97,000 students were enrolled in those schools in 2003-2004. Stip. pars. 10-16, 34[2]. Those students were about 66% white and 34% black. Stip. par. 36.

The School District had a long history of *de jure* racial segregation. In 1973, the Sixth Circuit held that "all vestiges of state-imposed segregation must be eliminated" in the School District. *Newburg Area Council, Inc. v. Board of Education of Jefferson County*, 489 F. 2d 925, 932 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918 (1974), *reinstated*, 510 F. 2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). In 1975, the District Court entered a decree which established racial guidelines for all schools and required countywide busing. Stip. Exh. 66. This student assignment plan remained in effect, with some court-ordered modifications, until 1984. Stip. Exhs. 67, 68, 69.

---

[1] Petitioner did not completely or accurately describe either the context and breadth of the District Court's opinion or the scope and complexity of the challenged student assignment plan. Respondents therefore submit their own more detailed statement of the case.

[2] In District Court, the plaintiffs and defendants entered into a 47-page stipulation of facts ("Stip.") with 75 exhibits ("Stip. Exh.").

In 1984, 1991 and 1996, the Board modified the court-ordered student assignment plan to enhance stability, expand choice and relax the racial guidelines, while maintaining racially integrated schools. The Board believed when it took those actions that it was no longer subject to the 1975 decree. *See*, Stip. Exhs. 67, 69 and 70. In 1999, however, the District Court held when the question was presented to it that the Board remained subject to the decree. *Hampton v. Jefferson County Board of Education*, 72 F. Supp. 2d 753 (W.D. Ky. 1999) ("*Hampton I*"). In 2000, the District Court dissolved the decree when it decided a challenge to the 1996 plan. *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358 (W.D. Ky. 2000) ("*Hampton II*").

In 2001, the Board adopted the current student assignment plan (the "Plan") in response to *Hampton II*.[3] Stip. Exh. 74. The Plan uses multiple strategies to achieve racially integrated schools: extensive school choice; automatic approval of majority-to-minority transfers; the grouping of elementary schools into clusters to facilitate integration; the periodic adjustment of attendance areas and programs to facilitate integration; staff training and orientation programs; administration, monitoring and accountability systems; and broad racial guidelines. Stip. Exh. 74.

---

[3] The District Court held in *Hampton II* that one magnet school should not be subject to the racial guidelines because it offered programs not available at other schools, and thus assignment to that school involved the distribution of a limited government benefit among competing applicants. 102 F. Supp. 2d at 380-81. The Board modified the 1996 plan to provide that three other magnet schools are not subject to the guidelines, for the same reason. The remaining magnet schools, which are subject to the guidelines, are basically similar to non-magnet schools in instruction, curriculum, policies and resources.

This action was brought by Petitioner Crystal D. Meredith and three other parents. The parents other than Meredith claimed that their children were unlawfully denied entry into magnet "traditional program" schools, which are subject to the Plan's racial guidelines. Meredith claimed that her son was denied entry into his "neighborhood school." All plaintiffs requested injunctive relief and damages. Appendix to Petition for Certiorari ("Pet. App.") E-1; the record below, 8, 15, 16.

The District Court held that the Plan satisfied the "compelling interest" requirement of this Court's equal protection decisions. The District Court also held that the Plan satisfied the "narrow tailoring" requirement of those decisions, except for one aspect of the application process at magnet traditional program schools. The District Court ordered the Board to change that process, but it did not grant any other relief to any plaintiff. Pet. App. C-1 to C-79.

Only Meredith appealed. The Court of Appeals affirmed the District Court in a *per curiam* opinion which held, "Because the reasoning which supports judgment for defendants has been articulated in the well-reasoned opinion of the district court, the issuance of a detailed written opinion by this court would serve no useful purpose." Pet. App. B-3. The Court of Appeals denied Meredith's subsequent petition for rehearing in an order which noted that "[n]o judge of this court ... requested a vote on the suggestion for rehearing en banc." Pet. App. A-2.

II. The Challenged Student Assignment Plan

The Plan provides that each school (except preschools, kindergartens, alternative and special schools, and the four exempted magnet schools) shall have not less than 15% and

not more than 50% black students. Stip. Exh. 74. The Plan achieves racial integration by a system of "managed choice." Each elementary, middle and high school (except for magnet schools, described below) has an attendance area. Some attendance areas have noncontiguous boundaries. Each non-magnet school is the "resides school" for students who reside in its attendance area. Of 130 elementary, middle and high schools, 118 are resides schools. Stip. par. 61. Elementary schools, except for five magnet schools, are grouped into 12 clusters. Each cluster contains at least five schools; some clusters contain more, up to 10. Stip. par. 62. The elementary schools in the cluster that includes a student's resides school are that student's "cluster resides schools."

The resides schools are supplemented by magnet schools and magnet and optional programs. Magnet schools do not have attendance areas, and students are admitted to those schools only by application. Magnet and optional programs are special programs offered by many resides schools. Stip. pars. 70, 72; Stip. Exh. 45. Even students who attend such a school as a resides student must apply to participate in a magnet or optional program. Stip. par. 67.

All schools in the School District are basically equal in the financial resources provided by the Board. The Board allocates funds to individual schools under a formula that is applied in the same manner to all schools. Stip. par. 27; Stip. Exh. 16: Tr. 1-130 to 1-131. All schools are basically equal in the instructional staff provided by the Board. All principals and teachers are hired and assigned in the same manner. Stip. pars. 29, 30. Although the exempted magnet schools offer certain programs not available at other schools, all schools are basically equal in the curriculum provided by the Board in compliance with state law, and in the quality of the instruction that is provided to students. Tr. 1-119 to 1-120, 2-152 to 2-

158, 4-92, 4-103 to 4-104, 4-139 to 4-140; Stip. Exhs. 29, 30 and 31. All schools are subject to the same student progression, promotion and grading handbooks, which contain the criteria for grading and promotion as reflected in state law. Tr. 2-157; Stip. Exh. 32. All schools are basically equal in matters such as discipline, dress codes, homework policies and extracurricular activities. All schools are subject to the same code of conduct and student bill of rights. Stip. pars. 28, 57.

Beginning in November, middle and high school students can apply to attend a school other than their resides school. On the applications, students can indicate a first and second choice among magnet schools and schools that offer magnet or optional programs. Stip. par. 66. Students entering the ninth grade can also submit an "open enrollment" application to attend any high school (except a magnet school). Stip. par. 73. Students who do not submit applications are assigned to their resides school.

Beginning in February, elementary students can apply to attend a school other than their resides school. On the applications, students can indicate a first and second choice among their cluster resides schools, and a first and second choice among magnet schools and schools that offer magnet or optional programs. Stip. par. 64. Students who do not submit applications are assigned to their resides school or one of their cluster resides schools.

Assignment decisions are made by school principals. The bases for assignment decisions vary depending upon the school or program, but they include: for all schools and programs, available space; for some schools and programs, computer-generated random draw lists; and for some schools and programs, objective requirements such as an essay,

recommendations, a work sample or audition, attendance data, grades or test scores. Stip. par. 77. For students in grades other than kindergarten and for schools other than the exempted magnet schools, an assignment decision cannot place the school outside the racial guidelines. However, compliance with the guidelines generally is assured in any event, by other means. *Infra*, pg. 7.

After assignments are made, students can apply to transfer to a school other than their assigned school (except a magnet school, magnet program or optional program). Transfer applications can be based on day care arrangements, medical criteria, family hardship, student adjustment problems and program offerings. Transfer applications are generally granted on a space-available basis, if the transfer assignment would not place the receiving school outside the guidelines. Stip. pars. 78, 86, 87, 88.

In 2003-2004, the School District enrolled about 89,000 elementary, middle and high school students. Stip. par. 34. About 9,300 students applied to attend a magnet school, magnet program or optional program. Stip. par. 79. About 1,200 ninth grade students applied for high school open enrollment. Stip. par. 80. About 6,200 students made transfer requests (which may overlap with magnet and option applications, because transfer is a second or third level choice). Stip. par. 81. Thus, only a small percentage of students applied to attend a school other than their resides school or a cluster resides school. Nevertheless, all students participated in the choice process, because a decision not to submit an application is itself a choice. However, most

students were assigned by default to their resides school or a cluster resides school.[4]

At resides middle and high schools, which enroll the great majority of middle and high school students, the racial guidelines are irrelevant as a practical matter. Racial integration at those schools is guaranteed by their attendance areas, some of which include noncontiguous boundaries. Racial integration at resides elementary schools is achieved by offering students a first and second choice among from five to 10 basically equal schools, and by granting nearly all of those choices. At the magnet schools which remain subject to the guidelines, and at magnet programs and optional programs, applications are typically denied for reasons other than the guidelines, most often lack of space. Tr. 2-84 to 2-85, 2-90 to 2-91, 2-98 to 2-99.

For these reasons, the impact of the racial guidelines on individual student assignments is minimal. Tr. 2-166 to 2-168, 5-109 to 5-114. As the District Court said, "[t]he guidelines mostly influence student assignment in subtle and indirect ways." Pet. App. C-18. Nonetheless, because the guidelines provide a firm definition of the Board's goal of racially integrated schools, they "provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15-50% range." *Id.*

---

[4] In 2003-2004, about 57% of elementary, 67% of middle and 50% of high school students attended their resides school. Stip. pars. 34, 89. About 95% of elementary students attended either their resides school or their first choice cluster resides school. Only about 3% of elementary students were assigned to a cluster resides school by the Board. TR 2-98 to 2-99, 5-109 to 5-114.

The number and percentage of Jefferson County students enrolled in the School District declined dramatically after the 1975 desegregation decree. The School District's "market share" has stabilized since the Board began its periodic revisions to the court-ordered plan in 1984, and the percentage of white students has stabilized despite a relative decline in white births in Jefferson County. Tr. 3-92 to 3-96, 3-100 to 3-102.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS

The thorough and well-reasoned opinion of the District Court, which was affirmed *per curiam* by the Sixth Circuit, does not conflict with any decision of this Court. The District Court meticulously tested the Plan against each guiding principle stated in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). The District Court concluded that the Plan met that test. Pet. App. C-1 to C-79. The Sixth Circuit had no reason to issue its own opinion. Pet. App. B-3.

Two other Courts of Appeals recently upheld similar race-conscious voluntary integration plans in K-12 schools in the light of *Grutter and Gratz*, and this Court recently denied a petition for a writ of certiorari in one of those cases. *Comfort v. Lynn School Committee*, 418 F. 3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (Dec. 5, 2005) (No. 05-348); *Parents Involved in Community Schools v. Seattle District No. 1*, 426 F. 3d 1162 (9th Cir. 2005), *pet. for cert. filed*, No. 05-908 (Jan. 18, 2005). Moreover, in *Brewer v. West Irondequoit Central School District*, 212 F. 3d 738 (2d Cir. 2000), which

predated *Grutter* and *Gratz*, the Second Circuit concluded that there is a compelling interest in reducing racial isolation in K-12 schools.

The purportedly conflicting Fourth and Fifth Circuit decisions cited by Meredith – *Tuttle v. Arlington County School Board*, 195 F. 3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000); *Eisenberg v. Montgomery County Public Schools*, 197 F. 3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); and *Cavalier v. Caddo Parish School Board*, 403 F. 3d 246 (5th Cir. 2005) -- involved an unequal distribution of educational benefits and burdens that is not present in *Comfort*, *Parents Involved* and this case. *Tuttle* involved admission to kindergarten in a special alternative school; *Eisenberg*, transfer to a math and science magnet school; and *Cavalier*, transfer to a performing arts magnet school.

Tuttle, *Eisenberg* and *Cavalier* are thus similar to *Wessman v. Gittens*, 160 F. 3d 790 (1st Cir. 1989), in which the First Circuit held unconstitutional a race-preferential admissions plan at a selective high school. In *Comfort*, the First Circuit expressly distinguished that prior decision: "The denial of a transfer under the [Lynn] Plan is ... markedly different from the denial of a spot at a unique or selective educational institution .... *Wessman*, 160 F. 3d at 793 (Boston Latin School)." 418 F. 3d at 20. In *Parents Involved*, the Ninth Circuit quoted this statement from *Comfort* in support of its own conclusion that "[T]he [Seattle] District's Plan imposes a minimal burden that is shared equally by all of the District's students." 426 F. 3d at 1191.

The purportedly conflicting Ninth Circuit decisions cited by Meredith -- *Smith v. University of Washington*, 392 F. 3d 367 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 334 (Oct. 3,

2005) (No. 04-1408), and *Doe v. Kamehameha Schools*, 416 F. 3d 1025 (9th Cir. 2005) -- are inapplicable for similar reasons. *Smith* involved the constitutionality of a competitive, race-preferential admissions program to a state law school. *Doe* involved the validity under 42 U.S.C. § 1981 of a race-preferential private school policy that limited admission to students of native Hawaiian ancestry. Both *Smith* and *Doe* predated the Ninth Circuit's recent decision in *Parents Involved*.

Thus, all of the purportedly conflicting decisions cited by Meredith involved the distribution of limited educational benefits among competing K-12 students, not the assignment or transfer of students generally among educationally comparable schools. The three Court of Appeals decisions which recently addressed voluntary integration plans in the latter context -- *Comfort*, *Parents Involved* and the Sixth Circuit's decision in this case -- are consistent in their application of *Grutter* and *Gratz* to K-12 schools in that context.

There is no conflict among circuits or with any decision of this Court. There is no reason for this Court to review the Sixth Circuit's decision.[5]

---

[5] A petition for review of the *Parents Involved* decision was docketed on the same day as the petition in this case. No. 05-908 (Jan. 18, 2005). There is no reason for this Court to review either decision. Nevertheless, a review and subsequent decision by this Court in only one case would likely be followed by further litigation below in the other case. Although both cases involve similar issues, the operative facts in each are somewhat different. Thus, if this Court found some unlikely reason to grant the petition in *Parents Involved*, Respondents suggest that the interests of judicial economy and the provision of useful guidance on these issues to all K-12 school districts would be served by the simultaneous grant of the petition in this case as well.

II. THE STUDENT ASSIGNMENT PLAN COMPLIES WITH THE EQUAL PROTECTION CLAUSE AS CONSTRUED BY THIS COURT IN *GRUTTER* AND *GRATZ*

A. The Board Has A Compelling Governmental Interest In Maintaining Racially Integrated Schools

When federal courts review race-based governmental action, "it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts." *Grutter*, 539 U.S. at 327, quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960). The District Court properly contextualized its equal protection analysis by first "defin[ing] with precision the interest being asserted." Pet. App. C-37, n. 29, quoting *Grutter*, 539 U.S. at 354 (Thomas, J., dissenting). The District Court twice noted "the Board's precise statement of its interests," which is "[t]o give all students the benefit of an education in a racially integrated school." Pet. App. C-2 and C-37, n. 29.

That, of course, is the goal that this Court sought for all students in *Brown v. Board of Education*, 347 U.S. 483 (1954). That goal is different from, and much more precisely focused than, the goal of "true diversity" in higher education that was held to be compelling in *Grutter*.[6] The District Court noted that "*Brown*'s original moral and constitutional

---

[6] "True diversity" includes, but encompasses more than, racial integration. *See, e.g.*, the Harvard College program discussed in *Regents of University of California v. Bakke*, 438 U.S. 265, 316 (1978). *See also, Brewer v. West Irondequoit Central School District, supra*, at 752-53.

declaration has survived to become a mainstream value of American education." Pet. App. C-45. The Board's goal is compelling because it is "consistent with central values and themes of American culture." Pet. App. C-43.

This Court said in *Grutter* that the Michigan Law School's goals for minority enrollment were "defined by reference to the educational benefits that diversity is designed to produce." 539 U.S. at 330. Those benefits, which this Court held to be "substantial," included promoting cross-racial understanding, helping to break down racial stereotypes, and enabling students to better understand persons of different races. Racial diversity in a law school "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals" because "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* The District Court found that "the same benefits accrue to students in racially integrated public schools." Pet. App. C-45 to C-46.

The District Court observed that the interests identified by the Board "overlap with those of the Michigan Law School at the individual student level," but that "the Board has articulated broader concerns in the different context of public elementary and secondary education." Pet. App. C-37. Accordingly, the District Court found certain compelling benefits of the Plan "that were not relevant in the law school context but are relevant to public elementary and secondary schools." Pet. App. C-4. Although improved academic performance of minority students was not a benefit mentioned in *Grutter*, the District Court found "equally compelling" the Board's good faith belief that racial integration has reduced the "achievement gap" between white and black students. Pet. App. C-47 to C-49.

And, the District Court found that community support for public schools is a compelling benefit of racial integration. The Plan has enabled the Board to reach the difficult goal of maintaining a system of racially integrated schools with a stable percentage of middle-class white students in a county which had a long history of *de jure* segregation and still has substantially segregated housing. Tr. 3-100. The Board's ability to maintain its "market share" in competition with private and parochial schools is greatly enhanced by the public perception that the School District offers a public school education in substantially equal schools in all parts of the county. Pet. App. C-49 to C-50.

The Board presented overwhelming factual evidence and expert opinion that racial integration in its schools furthers compelling educational, social, political and economic interests of the Board and the community. "Plaintiffs offered nothing to the contrary." Pet. App. C-47, n. 36. Thus, the District Court had "no doubt that Defendants have proven that their interest in having integrated schools is compelling by any definition." Pet. App. C-38.

B. The Student Assignment Plan Is Narrowly Tailored To Accomplish Its Purpose

The means chosen to accomplish the Plan's purpose must be "specifically and narrowly framed to accomplish that purpose." *Grutter,* 539 U.S. at 333. This requirement "ensure[s] that 'the means chosen 'fit' ... th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Id.*, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

In the case of a recently adopted government program involving public employment, public contracting or even university admissions, a court might need to search the record closely to disprove the possibility of improper motive. Here, given the Board's 30-year history of good faith efforts to provide racially integrated schools,[7] the District Court rightly concluded that "no one can honestly say that [the Board] is asserting an interest in racial balancing merely for its own sake." Pet. App. C-53. Indeed, "Plaintiffs did not introduce any evidence in either the *Hampton* case or this case that suggested the Board's motives were illegitimate, improper or insincere in any manner." Pet. App. C-53, n. 42.

In *Grutter*, this Court's narrow tailoring inquiry was "calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education," because "the very purpose of strict scrutiny is to take such 'relevant differences into account.'" 539 U.S. at 334, quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995). Likewise, the District Court measured the Plan for narrow tailoring "in light of the factual and analytical differences between this case and the admissions programs reviewed in *Grutter* and *Gratz*." Pet. App. C-54.

Meredith's principal argument with respect to the tailoring of the Plan is that it imposes a "mechanical and inflexible quota system." Petition for Certiorari ("Pet.") 7. The District Court correctly disagreed. Under *Grutter*, *Gratz* and other decisions of this Court, a quota "has a precise target, and it insulates some applicants from competition with other applicants." Pet. App. C-57. The Plan does neither.

---

[7] *See, Hampton II*, 102 F. Supp. 2d at 369-70.

The racial guidelines encompass a range of 35 percentage points, from 15% above to 20% below the average black enrollment. The actual black enrollment among schools in 2003-2004 varied widely within this range, from 20.1% to 50.4%. Stip. Exh. 21. The District Court noted that "only about 30% of all schools show a racial mix within even five percent of either side of the systemwide average," indicating "a widely dispersed range in Black students among JCPS schools rather than a precise target." Pet. App. C-58. Indeed, "the range in the percentage of Black students among all JCPS schools is much broader than the range in minority admissions at either Amherst College [cited in Justice Kennedy's dissent in *Grutter* as not involving a quota] or Michigan Law School." Pet. App. C-59.

The Plan applies in an even-handed manner to both black and other students, and it does not operate to exclude or include either group absolutely from schools or programs. A student's assignment is determined by "a host of factors, such as residence, student choice, capacity, school and program popularity, pure chance and race." Pet. App. C-69. Because non-racial criteria are significant factors in assigning students, the District Court concluded that "[n]o JCPS student is insulated from competition with all other students, and no student is placed on a separate admissions track." Pet. App. C-60.

The District Court noted that *Grutter*'s "requirement of individualized consideration," 539 U.S. at 336-37, must be applied in the "totally different context" of a K-12 school system which "does not have the goal of creating elite and highly selective school communities" but instead seeks to "create more equal school communities for educating all students." Pet. App. C-62. "Individualized consideration" ensures that a university's stated goal of "true diversity" is

not a pretext for the use of race as the sole criterion for decision. *Grutter*, 539 U.S. at 337; *Bakke*, 438 U.S. at 316. Because the Board's openly stated (and constitutionally compelling) goal is racial integration, there is no need to guard against pretext.

The decisive question under *Grutter* is whether the Plan is "flexible." 539 U.S. at 334-37. In higher education, an admissions process is flexible if it does not define applicants by race or ethnicity, because that "ensure[s] that each applicant is evaluated as an individual." 539 U.S. at 337. In the Plan, flexibility is provided by the many opportunities for individual students to attend a school other than their resides school. Student choice is an important tool for maintaining racially integrated schools, because it helps the Board attract and retain the white students who make integration possible. However, it is not the exercise of the relatively small number of choices that achieves integration. That is achieved largely by the use of attendance areas and school clusters. *Supra*, pg. 7.

Given this framework, the District Court found that the decisions on the small number of individual applications can be and are made for reasons other than race, and "[e]ven where race does 'tip' the balance in some cases, it does so only at the end of the process, *after* residence, choice and all the other factors have played their part." Pet. App. C-70. (emphasis in original) Thus, "the appropriate consideration of individual factors within the assignment context ensures that race does not become 'the defining feature' of a student's application." Pet. App. C-64.

Narrowly tailored government action does "not unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. The Plan has a different goal, and presents different

issues, than the "affirmative action" programs in which this principle is most often tested. Those programs seek to include minorities in venues such as public employment,[8] public contracting[9] and public higher education[10] in which government is the source of valuable and limited goods and services. In those programs, tangible benefits might be granted to minorities to the detriment of other applicants. The Michigan Law School, for example, "excludes many applicants because of its goal of creating an elite community." Pet. App. C-66. Under the Plan, however, "no student is directly denied a benefit because of race so that another of a different race can receive that benefit." Pet. App. C-67. Instead, "the Board uses race in a limited way to achieve benefits for all students" by "creating communities of equal and integrated schools for everyone." Pet. App. C-67, C-66.

Meredith did not present any meaningful evidence that her son was unduly, or at all, harmed by his assignment to kindergarten in 2002-2003.[11] Lacking proof of harm, Meredith argued simply that some schools in the District offer a better education than other schools because they report

---

[8] *E.g.*, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[9] *E.g.*, *Adarand, supra.*

[10] *E.g.*, *Gratz* and *Grutter, supra.*

[11] Meredith stipulated that her son did not submit a choice application for kindergarten for 2002-2003, attempted to enroll late at his resides school, was assigned to another school because there was no space at his resides school, did not appeal the denial of his application to transfer to a third school, and did not submit a choice application for first grade for 2003-2004. Stip. par. 5.

higher average test scores. Tr. 1-25 to 1-28, 1-35; *cf.*, Pet. 13. That argument is both factually[12] and legally inadequate.

Meredith and the other plaintiffs had a strong preference for the schools to which their children were not assigned. But the children who were not assigned to the school of their choice did not lose public employment as in *Wygant*, or a government contract as in *Adarand*, or an education at a prestigious public college or law school as in *Gratz* and *Grutter*, or even an education at a "unique or selective" secondary school as in *Wessman, supra*. The children were not denied an education, only a choice. *See, e.g.*, *Bakke*, 438 U.S. at 300 n. 39 (1978). The District Court correctly concluded that "[b]ecause all schools have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools, an assignment to one school over another does not cause constitutional harm to any student." Pet. App. C-70.

The Board has considered other methods of reaching its goal, thereby satisfying this Court's requirement that it consider "lawful alternative and less restrictive means." *Grutter*, 539 U.S. at 339-40, quoting *Wygant*, *supra*, 476

---

[12] The Board's unrebutted evidence showed that average test scores are overwhelmingly correlated with the "social capital" of students, and that some schools rank higher than others with respect to average social capital. Tr. 3-145 to 3-151, 3-174 to 3-177. Nevertheless, the Board has had substantial success with its efforts to increase the achievement of its "at risk" and low performing students. Tr. 1-122 to 1-129, 3-25 to 3-30. Racial integration under the Plan plays an important role in those efforts. Tr. 5-16 to 5-20. In any event, the average of a wide range of scores says nothing about the performance of any individual student. Tr. 2-46 to 2-49.

U.S. at 280 n. 6. This aspect of narrow tailoring "does not require exhaustion of every conceivable" substitute, only a "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339. The Board concluded that socioeconomic criteria would not provide an adequate substitute for racial guidelines. Tr. 1-137 to 1-138, 2-188 to 2-189. The District Court found that a system-wide assignment lottery "would require a 'dramatic sacrifice' in student choice, geographic convenience and program specialization" and "could only be achieved at a huge financial cost." Pet. App. C-68. More importantly, the District Court concluded that the schools would not long remain racially integrated in the absence of the guidelines, because they provide the student assignment staff with an essential "yardstick" that gives them "moral authority ... to facilitate, negotiate and work collaboratively with principals and district staff to ensure that the plan is implemented." Tr. 2-134, 2-143; *see also*, Pet. App. C-18. The District Court noted that "a vast proportion of all student assignments" under the Plan are made in a manner that "avoid[s] using race at all," because of exemptions from the guidelines, voluntary student choices and the resides school attendance areas. Pet. App. C-68. Thus, the Board has not only "sufficiently considered" but has actually "*used* alternatives, which either were race-neutral or made minimal use of race, to meet narrow tailoring requirements." Pet. App. C-69. (emphasis added)

Finally, "race-conscious admissions policies must be limited in time." *Grutter,* 539 U.S. at 342. This Court has suggested that this aspect of narrow tailoring can be satisfied by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* Any action taken by an elected local board of education is inherently subject to change, as the members of the Board and

public perceptions change. The Board has regularly and frequently revisited the necessity for, and the scope of, its use of race in student assignment. The Board modified its student assignment plan in 1984, 1991, 1996 and 2001, and the Board will modify the Plan in the future as required by new circumstances. Tr. 2-189.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Francis J. Mellen, Jr.
Counsel of Record
Byron E. Leet
WYATT, TARRANT & COMBS, LLP
PNC Plaza, 500 W. Jefferson St.
Louisville, Kentucky 40202
(502) 589-5235

Rosemary Miller
General Counsel
Jefferson County Board of Education
3332 Newburg Road
Louisville, Kentucky 40218
(502) 485-3154

Attorneys for Respondents